

SENATE BILL NO. 234

INTRODUCED BY J. TESTER, BALES, BERRY, CHRISTIAENS, COLE, DOHERTY, ELLINGSON, ESP,
GILLAN, GROSFIELD, GUTSCHE, HALLIGAN, JERGESON, LEE, LINDEEN, MANGAN, MOHL, NELSON,
PRICE, ROUSH, SHEA, F. THOMAS, J. WELLS

A BILL FOR AN ACT ENTITLED: "AN ACT PROVIDING FOR THE DUTIES OF TRUSTEES AND OFFICERS
OF A RURAL COOPERATIVE UTILITY; ESTABLISHING WHEN A TRUSTEE OR OFFICER HAS A CONFLICT
OF INTEREST; PROVIDING THAT RURAL COOPERATIVE UTILITIES MAY INDEMNIFY TRUSTEES AND
OFFICERS; PROVIDING CERTAIN CONDITIONS UNDER WHICH TRUSTEES AND OFFICERS ARE NOT
PERSONALLY LIABLE TO THE RURAL COOPERATIVE UTILITY; AMENDING SECTION 35-18-302, MCA;
AND PROVIDING AN IMMEDIATE EFFECTIVE DATE."

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF MONTANA:

NEW SECTION. Section 1. Duties of trustees and officers. (1) A trustee or officer shall discharge
the duties of the office, including the trustee's or officer's duties as a member of any committee:

(a) in good faith;

(b) with the care that an ordinarily prudent person in a similar position would exercise under similar
circumstances; and

(c) in a manner that the trustee or officer reasonably believes to be in the best interest of the
cooperative.

(2) In discharging duties, a trustee or officer is entitled to rely on factual information, opinions,
reports, or statements, including but not limited to financial statements and other financial information,
if prepared and presented by:

(a) one or more officers or employees of the cooperative whom the trustee or officer reasonably
believes to be reliable and competent in the subject matter presented;

(b) attorneys, public accountants, engineers, or other persons with regard to subject matters that
the trustee or officer reasonably believes are within the person's professional or expert competence; or

(c) a committee of the board of trustees or officers of which the trustee or officer is not a member
if the trustee or officer reasonably believes that the committee merits confidence.

(3) A trustee or officer is not acting in good faith if the trustee or officer has knowledge concerning the matter in question that makes reliance otherwise permitted by subsection (2) unwarranted.

(4) A trustee or officer is not liable for any action taken as a trustee or officer or for any failure to take any action if the trustee or officer performs the duties of the office in compliance with this section.

NEW SECTION. Section 2. Trustee or officer conflict of interest. (1) A conflict of interest transaction is a transaction with the cooperative in which a trustee of the cooperative has a direct or indirect interest. A conflict of interest transaction is not voidable and may not be the basis for imposing liability on the trustee or officer if the transaction was fair at the time the transaction was entered into.

(2) If a trustee or officer has a conflict of interest relating to a transaction, the trustee or officer:

(a) shall disclose to the trustees or members voting on the transaction the existence and nature of the conflict of interest and all facts known to the trustee with respect to the subject matter of the transaction that an ordinarily prudent person would reasonably believe to be material to a judgment about whether or not to proceed with the transaction; and

(b) may not participate, directly or indirectly, in the vote on the transaction.

(3) For the purposes of this section, a trustee or officer of a cooperative has an indirect interest in a transaction if:

(a) another entity in which the trustee or officer has a material interest or in which the trustee or officer is a general partner is a party to the transaction; or

(b) another entity, other than a cooperative or corporation of which the cooperative is a member or shareholder, of which the trustee or officer is a director, officer, or trustee is a party to the transaction.

(4) (a) Except as provided in subsection (4)(b), a conflict of interest transaction is authorized, approved, or ratified if the transaction receives the affirmative vote of a majority of the trustees or officers on the board or committee who do not have a direct or indirect interest in the transaction.

(b) A transaction may not be authorized, approved, or ratified by a single trustee or officer.

(c) If a majority of the trustees or officers on the board or committee who do not have a direct or indirect conflict of interest in the transaction vote to authorize, approve, or ratify the transaction, a quorum is present for the purpose of taking action on the transaction.

(d) The presence of or vote cast by a trustee with a direct or indirect interest in the transaction does not affect the validity of any action taken under this section if the transaction is authorized,

1 approved, or ratified as provided in this section.

2 (5) The articles or bylaws of the cooperative may impose additional requirements on conflict of
3 interest transactions.

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5 NEW SECTION. **Section 3. Definitions.** As used in [sections 3 through 9], the following
6 definitions apply:

7 (1) "Liability" means the obligation to pay a judgment, settlement, penalty, or fine, including an
8 excise tax assessed with respect to an employee benefit plan, or to pay reasonable expenses incurred with
9 respect to a proceeding.

10 (2) (a) "Official capacity" means the office of trustee or officer in a cooperative.

11 (b) The term does not include service for any other domestic cooperative or any partnership, joint
12 venture, trust, or other enterprise.

13 (3) "Party" includes an individual who was, is, or is threatened to be made a named defendant
14 or respondent in a proceeding.

15 (4) "Proceeding" means any threatened, pending, or completed action, suit, or proceeding,
16 whether civil, criminal, administrative, or investigative and whether formal or informal.

17 (5) (a) "Trustee or officer" means an individual who is or was a trustee or officer of a cooperative
18 or an individual who, while a trustee or officer of a cooperative, is or was serving at the cooperative's
19 request as a director, officer, partner, trustee, employee, or agent of another domestic cooperative,
20 partnership, joint venture, trust, or other enterprise.

21 (b) The term includes, unless the context requires otherwise, the estate or personal representative
22 of a trustee or officer.

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24 NEW SECTION. **Section 4. Authority to indemnify.** (1) Except as provided in subsection (4), an
25 individual who is made a party to a proceeding because the individual is or was a trustee or officer may
26 be indemnified against liability incurred in the proceeding if:

27 (a) the individual conducted business in good faith;

28 (b) the individual reasonably believed:

29 (i) in the case of conduct in the individual's official capacity with the cooperative, that the
30 individual's conduct was in the cooperative's best interests; and

(ii) in all other cases, that the individual's conduct was at least not opposed to the cooperative's best interests; and

(c) in the case of any criminal proceeding, the individual had no reasonable cause to believe that the conduct was unlawful.

(2) The termination of a proceeding by judgment, order, settlement, conviction, or upon a plea of nolo contendere or its equivalent is not, of itself, a determination that the trustee or officer did not meet the standard of conduct described in this section.

(3) A cooperative may not indemnify a trustee or officer under this section:

(a) in connection with a proceeding by or in the right of the cooperative in which the trustee or officer was adjudged liable to the cooperative; or

(b) in connection with any other proceeding charging improper personal benefit to the trustee or officer, whether or not involving action in the trustee's or officer's official capacity, in which the trustee or officer was adjudged liable on the basis that personal benefit was improperly received by the trustee or officer.

(4) Indemnification permitted under this section in connection with a proceeding by or in the right of the cooperative is limited to reasonable expenses incurred in connection with the proceeding.

NEW SECTION. Section 5. Mandatory indemnification. Unless limited by its articles of incorporation, a cooperative shall indemnify a trustee or officer who was wholly successful, on the merits or otherwise, in the defense of any proceeding to which the trustee or officer was a party because the trustee or officer is or was a trustee or officer of the cooperative against reasonable expenses incurred by the trustee or officer in connection with the proceeding.

NEW SECTION. Section 6. Court-ordered indemnification. Unless a cooperative's articles of incorporation provide otherwise, a trustee or officer of the cooperative who is a party to a proceeding may apply for indemnification to the court conducting the proceeding or to another court of competent jurisdiction. On receipt of an application, the court, after giving any notice that the court considers necessary, may order indemnification if it determines that the trustee or officer:

(1) is entitled to mandatory indemnification under [section 5], in which case the court shall also order the cooperative to pay the trustee's reasonable expenses incurred in obtaining court-ordered

1 indemnification; or

2 (2) is fairly and reasonably entitled to indemnification in view of all the relevant circumstances.

3 If the trustee or officer was adjudged liable as described in [section 4(3)], the trustee's or officer's

4 indemnification is limited to reasonable expenses incurred.

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6 **NEW SECTION. Section 7. Determination and authorization of indemnification.** (1) A cooperative
7 may not indemnify a trustee or officer under [section 4] unless authorized in the specific case after a
8 determination has been made that indemnification of the trustee or officer is permissible in the
9 circumstances because the trustee or officer has met the standard of conduct set forth in [section 4].

10 (2) The determination must be made:

11 (a) by the board of directors by majority vote of a quorum consisting of directors not at the time
12 parties to the proceeding;

13 (b) if a quorum cannot be obtained under subsection (2)(a), by majority vote of a committee
14 designated by the board of directors, in which designated directors who are parties may participate;

15 (c) by special legal counsel:

16 (i) selected by the board of directors or its committee in the manner prescribed in subsection (2)(a)
17 or (2)(b); or

18 (ii) if a quorum of the board of directors cannot be obtained under subsection (2)(a) and a
19 committee cannot be designated under subsection (2)(b), selected by majority vote of the full board of
20 directors in which selected directors who are parties may participate; or

21 (d) by the shareholders, but shares owned by or voted under the control of directors who are at
22 the time parties to the proceeding may not be voted on the determination.

23 (3) Authorization of indemnification and evaluation as to reasonableness of expenses must be
24 made in the same manner as the determination that indemnification is permissible, except that if the
25 determination is made by special legal counsel, authorization of indemnification and evaluation as to
26 reasonableness of expenses must be made by those entitled under subsection (2)(c) to select counsel.

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28 **NEW SECTION. Section 8. Insurance.** A cooperative may purchase and maintain insurance on
29 behalf of an individual who is or was a director, trustee, officer, employee, or agent of the cooperative or
30 who, while a director, trustee, officer, employee, or agent of the cooperative, is or was serving at the

request of the cooperative as a director, trustee, officer, partner, employee, or agent of another domestic cooperative, partnership, joint venture, trust, or other enterprise, against liability asserted against or incurred by the individual in that capacity or arising from an individual's status as a director, trustee, officer, employee, or agent, whether or not the cooperative would have power to indemnify the individual against the same liability under [section 4 or 5].

NEW SECTION. Section 9. Application. (1) A provision treating a cooperative's indemnification of trustees or officers that is contained in its articles of incorporation, its bylaws, a resolution of its shareholders or board of directors, a contract, or other instrument is valid only if and to the extent that the provision is consistent with [sections 3 through 9]. If articles of incorporation limit indemnification, indemnification is valid only to the extent that it is consistent with the articles of incorporation.

(2) [Sections 3 through 9] do not limit a cooperative's power to pay or reimburse expenses incurred by a trustee or officer in connection with the trustee's or officer's appearance as a witness in a proceeding at a time when the trustee or officer has not been made a named defendant or respondent to the proceeding.

Section 10. Section 35-18-302, MCA, is amended to read:

"35-18-302. Nonliability of members, trustees, and officers for debts of cooperative. (1) The private property of the members of a cooperative ~~shall be~~ is exempt from execution for the debts of the cooperative, and ~~no a member shall be~~ is not liable or responsible for any debts or obligations of the cooperative.

(2) A trustee or officer of a cooperative or acting for a cooperative is not personally liable to the cooperative or its members for any actions taken or a failure to take action as a trustee or officer unless:

(a) the trustee or officer fails to perform the trustee's or officer's responsibilities, including those provided in [sections 1 and 2]; and

(b) the failure to perform constitutes willful misconduct or recklessness."

NEW SECTION. Section 11. Codification instruction. [Sections 1 through 9] are intended to be codified as an integral part of Title 35, chapter 18, part 3, and the provisions of Title 35, chapter 18, part 3, apply to [sections 1 through 9].

2 NEW SECTION. **Section 12. Effective date.** [This act] is effective on passage and approval.

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